STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 95B123

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

EDDIE G. GARCIA,

Complainant,

vs.

THE DEPARTMENT OF REVENUE,
DIVISION OF MOTOR VEHICLES,

Respondent.

This matter came on for hearing before Administrative Law Judge Robert W. Thompson, Jr. on July 20, 1995. Respondent was represented by Mark W. Gerganoff, Assistant Attorney General. John Duncan appeared as respondent's advisory witness. Complainant appeared and was represented by Alex Frank Gallegos, Attorney at Law.

Respondent called the following witnesses: Carol A. Russell; Daniel M. Russell; Lawrence A. Lopez, Sergeant, Alamosa Police Department; and John A. Duncan, Deputy Director for the Division of Motor Vehicles and the appointing authority. The complainant testified in his own behalf.

Respondent's Exhibits 6 and 9 were admitted into evidence without objection. Exhibits 3, 4, 5, 7, 8, 10A and 11A were admitted over objection. Exhibit 2 was offered but not admitted. Complainant did not offer any exhibits.

MATTER APPEALED

Complainant timely appealed an agency decision to terminate his employment effective March 10, 1995. For the reasons set forth below, the agency's termination action is affirmed.

ISSUES

1. Whether respondent's action was arbitrary, capricious or contrary to rule or law;

2, Whether there was just cause for the termination;

3. Whether either party is entitled to an award of attorney fees.

FINDINGS OF FACT

1. The complainant, Eddie G. Garcia, served for over nine years as a driver's license examiner for the Department of Revenue, Division of Motor Vehicles. He received generally above standard performance evaluations and had been issued no prior corrective or disciplinary actions. Stationed in Alamosa, a town with a population of between 8,000 and 10,000, Garcia was certified in the position of License Examiner II at the time of the termination of his employment.

2. On Saturday, February 4, 1995 at around 6:00 p.m., Alamosa

resident Carol Russell noticed a pick-up truck stuck and spinning its wheels in the ditch in front of her house. She telephoned her husband, Daniel Russell, at work, who said to advise the driver that he would be home in about fifteen minutes and could pull the truck out of the ditch with a four-wheel drive vehicle. Mrs. Russell then went to the scene and recognized complainant, who she knew from the driver's license office. Complainant was with his eight year-old son. Because of his slurred speech and unsteady gait, Mrs. Russell concluded that the complainant was intoxicated. She returned to the house and telephoned the police.

3. Daniel Russell arrived home at around 6:20. However, he did not go to assist complainant because Mrs. Russell had told him that complainant was obviously drunk. They decided to wait for the police, who, as it turned out, did not respond.

4. At around 6:30 complainant appeared with his son at the Russell's door to ask for help. Mr. Russell then responded to the scene with his four-wheel drive vehicle. It appeared to Mr. Russell that the truck had slid off the right side of the road to the left. Mr. Russell observed that complainant had an odor of alcohol on his breath, had trouble talking, staggered and seemed disoriented. There was an empty bottle of schnapps on the ground next to the driver's door of the pick-up. The bottle looked "new" because there was no dirt on it and dirt had been scattered about due to the spinning of the tires in complainant's effort to escape from the ditch. Mr. Russell concluded that complainant was intoxicated.

5. Apparently the truck was pulled from the ditch but would not run and was abandoned. Mr. Russell gave complainant and the boy a ride home. During the drive, complainant seemed disoriented as to direction. When they arrived, the boy exited first. Complainant

stumbled while exiting and fell on top of his son. He told his son that they were still going to go out for a pizza.

6. Complainant and his son walked to the Pizza Hut, a distance of about six blocks, then on to the motor vehicle office, about a block and one-half further, where complainant picked up a state car and drove with his son to the Pizza Hut, located on Main Street in the center of town. He parked the car in the parking lot, leaving the key in the ignition and the doors unlocked.

7. Inside the Pizza Hut, complainant became loud, boisterous and belligerent. Several patrons and employees were present. A Pizza Hut employee summoned the police. At approximately 8:15 p.m., three police officers responded to the scene. Officer Salazar confronted complainant in the Pizza Hut and advised him not to drive. Officer Salazar then telephoned Sgt. Lopez, the on-duty supervisor at the police station, asking to have a supervisor on the scene because complainant was well known in the community and was involved in local politics. (Complainant had served on the city council and had publicly criticized the police department for alleged selective law enforcement.) Salazar advised Sgt. Lopez that Ed Garcia was drunk and had stated that he drove the vehicle to the Pizza Hut and that he intended to drive it home. Salazar and the other two officers then situated themselves in separate strategic locations outside the Pizza Hut to await the arrival of Sgt. Lopez and to watch for complainant.

8. When Sgt. Lopez arrived on the scene, he found complainant and the child just outside the Pizza Hut. Complainant yelled words to the effect that he could get drunk if he wanted to. Complainant was stumbling, had an odor of alcohol on his breath, and his eyes were bloodshot. Sgt. Lopez recognized these as signs of intoxication. Complainant was placed under arrest and taken

to the detoxification center. Sgt. Lopez believes that another officer took the child home to the child's mother. At the detoxification center, complainant continued to be belligerent, resulting in his being placed in the "quiet room".

9. Sgt. Lopez returned to the Pizza Hut parking lot and found the state car with the key in the ignition and the doors unlocked. He then contacted someone with the motor vehicle division who asked him to take the vehicle into custody to be retrieved by the division on the following Monday.

10. On Monday morning, February 6, 1995, John Duncan, as Deputy Director for the Motor Vehicle Division and the appointing authority for 300 positions including complainant's, received word of the February 4 incident. Duncan scheduled a Rule R8-3-3 meeting with complainant for February 13. This information exchange meeting was subsequently rescheduled for February 15 at the request of complainant's counsel.

11. Complainant appeared at the R8-3-3 meeting represented by counsel. He admitted that he had driven a state vehicle with his son as a passenger. He explained that he thought he had the discretion to drive a state vehicle in the case of an emergency. He believed that an emergency existed on February 4 because it was a cold night, he had his son with him and his truck had broken down. He denied drinking prior to going to the Pizza Hut, where, he said, he was served three beers. He admitted that there was an empty bottle of schnapps in his truck.

12. Following the R8-3-3 meeting, Duncan reviewed the written investigative reports - Exhibits 3, 4, 5, 7, 8 and 10A - and listened to the tapes of the 911 calls (presumably made by Mrs. Russell and the Pizza Hut employee). This information

contradicted complainant's account of events. Duncan gave greater weight to the accounts of the percipient witnesses than to complainant's statements. Duncan also reviewed complainant's personnel file, including past performance appraisals.

13. Duncan concluded that complainant had violated the agency policy which strictly prohibits transporting non-employees in state vehicles for personal reasons and driving a state vehicle on the weekend for a non-business purpose. He reasoned that an emergency requiring the use of a state vehicle did not exist and that complainant had exposed the agency to potentially great liability by driving a state vehicle while he was intoxicated. He felt that complainant's conduct was offensive to the agency's mission of promoting safety on the highways, endangered the eight year-old boy and breached the public's confidence in the agency by confronting the police while in possession of a stationwagon marked by its license plate as a state vehicle.

14. Contrary to his statements at the R8-3-3 meeting, complainant testified at hearing that, on February 4, he had "maybe four drinks total" at around 4:00 p.m., defining "drink" as a shot glass of Canadian Mist. He denied that there was ever a schnapps bottle in his pick-up. He testified that his son had had a birthday two days before and he and the boy were celebrating the birthday. (Complainant is a non-custodial parent.) He had promised his son that they would go to Pizza Hut, and after the disabling of his pick-up his son still insisted that they do so. It was a cold night and he decided to pick up the state car so they wouldn't have to walk back home. He felt justified in using a state vehicle under these circumstances, which he considered an emergency, adding that examiners sometimes take a state car home with them. He testified that he agreed with Officer Salazar's suggestion that he walk home because he was drunk and that's what

he was intending to do when Sgt. Lopez appeared on the scene. He intended to call the other examiner and ask him to go get the state car, or at least lock it up.

15. Complainant testified that he started drinking because he had been informed by the doctor that his mother was in a coma and was not expected to live. His pick-up got stuck when he tried to back up and turn around in order to show his son a rabbit that had run across the road. He was uncooperative at the police station because the police would not tell him where his son was and would not let him take his medication. He and his son did not eat at the Pizza Hut because they walked out. He does not know what happened to the pizzas and thinks the police probably ate them.

16. By letter dated and hand-delivered to complainant March 2, 1995, the appointing authority dismissed the complainant effective March 10, 1995, for five reasons:

a) Misuse of the state vehicle on February 4, 1995.

b) Permitting unauthorized passengers in a state vehicle.

c) Operating a state vehicle while intoxicated.

d) Violation of State Personnel Board Rule 8-1-5, State Assets Not to be Put to Private Use.[1]

e) Willful misconduct in violation of State Personnel Board Rule 8-3-3(C)(2).[2]

Respondent's Exhibit 9.

DISCUSSION

[1] 4 Code Colo. Reg. 801-1

[2] 4 Code Colo. Reg. 801-1

In this de novo disciplinary proceeding, the burden is on the agency to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause exists for the discipline imposed. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994).

Substantial evidence sustains a conclusion that respondent satisfied its burden to prove that the complainant committed the acts for which discipline was imposed, i.e., the five reasons for termination set forth in Exhibit 9. "Substantial evidence" means more than some evidence in some particulars. It is probative evidence that would warrant a reasonable belief in the existence of facts supporting a particular finding. Nicholas v. North Carolina Medical Center, Inc., ___ P.2d ___, (Colo. App. No. 93CA1379, Feb. 2, 1995), 24 The Colorado Lawyer 853 (April 1995). Thus, the agency action can be overturned only if the appointing authority abused his discretion in imposing the sanction of dismissal or otherwise acted in a manner arbitrary, capricious or contrary to rule or law.

Complainant contends that the imposed sanction is "draconian" and submits as mitigating factors that he drove the state vehicle only one and one-half blocks and only because it was a cold night and he had his young son with him, and that he was emotionally upset over the impending death of his mother. Complainant submits that he heeded the advice of Officer Salazar by intending to walk home rather than drive any further. Complainant asserts that no evidence was introduced to show that the agency was embarrassed or was viewed in a lesser light as a result of his conduct. While conceding that "there was some kind of policy violation here", and now admitting that he made a mistake, complainant points to his nine-year "unblemished" employment record and submits that his behavior on February 4 does not constitute willful misconduct and

does not adversely affect his ability to perform the duties of his position.

Complainant's credibility is diminished by the inconsistencies between his testimony at hearing and his statements at the R8-3-3 meeting. Overall, complainant's testimony was contrived, unsupported and in conflict with the weight of the evidence. Nothing in this record supports complainant's assertion that he had the discretion as a license examiner to drive a state vehicle in an intoxicated condition on a Saturday night with an unauthorized passenger for a non-business purpose. No reasonable person could conclude that an emergency existed to justify such misconduct, which is found to be willful. Once safely home, complainant should have stayed there.

The appointing authority fairly considered the factors set out in Rule R8-3-1, 4 Code Colo. Reg. 801-1, in deciding whether to correct or discipline the complainant. In driving a state vehicle while under the influence of alcohol, an inexcusable violation of law and public policy, then leaving the vehicle in an unprotected public parking lot unlocked with the key in the ignition, complainant engaged in conduct "so flagrant or serious" as to warrant immediate disciplinary action. Rule R8-3-1 (C), 4 Code Colo. Reg. 801-1.

Dismissal was not the only option. Rule R8-3-3(A), 4 Code Colo. Reg. 801-1. Yet it is the responsibility of the appointing authority to determine the appropriate course of action in a given situation. The Board must give due deference to the agency's primary discretion in exercising its obligation to maintain employee discipline and efficiency. There is no evidence of record from which to conclude that the appointing authority abused this discretion. The administrative law judge is not persuaded

that he is better suited to exercise the responsibilities of personnel management than is the appointing authority who disciplined this complainant, notwithstanding complainant's length of service and prior job performance. See Chiappe v. State Personnel Board, 622 P.2d 527, 534 (Colo. 1981).

Given the facts of this case, inclusive of arguably mitigating factors, an award of attorney fees and costs is not justified under § 24-50-125.5, C.R.S. of the State Personnel System Act.

CONCLUSIONS OF LAW

1. Respondent's action was not arbitrary, capricious or contrary to rule or law.

2. There was just cause for the termination.

3. Neither party is entitled to an award of attorney fees.

ORDER

The action of the respondent is affirmed. Complainant's appeal is dismissed with prejudice.

DATED this _____ day of August, 1995, at Denver, Colorado.

_____
Robert W. Thompson, Jr.
Administrative Law Judge

CERTIFICATE OF MAILING

This is to certify that on the ____ day of August, 1995, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Alex Frank Gallegos
Attorney at Law
P.O.B. 609
Del Norte, CO 81132

and in the interagency mail, addressed as follows:

Mark W. Gerganoff
Assistant Attorney General
General Legal Services Section
1525 Sherman Street, 5th Floor
Denver, CO 80203

_____

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1.To abide by the decision of the Administrative Law Judge ("ALJ").

2.To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties and advance the cost therefor. Section 24-4-105(15), 10A C.R.S. (1993 Cum. Supp.). Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990);

Sections 24-4-105(14) and (15), 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 et seq., 4 Code of Colo. Reg. 801-1. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

RECORD ON APPEAL

The party appealing the decision of the ALJ - APPELLANT - must pay the cost to prepare the record on appeal. The estimated cost to prepare the record on appeal in this case without a transcript is $50.00. The estimated cost to prepare the record on appeal in this case with a transcript is $678.50. Payment of the estimated cost for the type of record requested on appeal must accompany the notice of appeal. If payment is not received at the time the notice of appeal is filed then no record will be issued. Payment may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS. If the actual cost of preparing the record on appeal is more than the estimated cost paid by the appealing party, then the additional cost must be paid by the appealing party prior to the date the record on appeal is to be issued by the Board. If the actual cost of preparing the record on appeal is less than the estimated cost paid by the appealing party, then the difference will be refunded.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 1/2 inch by 11 inch paper only. Rule R10-10-5, 4 Code of Colo. Reg. 801-1.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R10-10-6, 4 Code of Colo. Reg. 801-1. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ, and it must be in accordance with Rule R10-9-3, 4 Code of Colo. Reg. 801-1. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.